

Michigan House of Representatives
Elections Committee Meeting
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Room 308, House Office Building, Lansing, MI

Testimony of Ellis Boal
representing
Committee to Ban Fracking in Michigan

Committee To Ban Fracking in Michigan

SB 776 to amend Michigan's "180-day" rule for collection of signatures
for statutory initiatives, background on MCL 168.472a
(Revised March 14, 2016)

On March 10 the Michigan Senate passed SB 776 which amends MCL 168.472a (the "180-day statute") to read:

"The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state."

Currently the 180-day statute says:

"It shall be rebuttably presumed that the signature on a petition that proposes an amendment to the constitution or is to initiate legislation, is stale and void if the signature was made more than 180 days before the petition was filed with the office of the secretary of state."

In sum, the bill would invalidate all signatures over 180 days old at the time of filing regardless of their validity.

This is not a "freshness" bill. Current law which allows signatures to be collected two or three years in advance of the election would remain in place.

The Senate provided the bill would have immediate effect. The bill is now on its way to the House.

There are two problems with this bill, one short-range and the other long-range.

The short-range problem

The short-range problem arises as to campaigns for statutory initiatives -- also called legislative initiatives -- which are currently ongoing. One is an initiative to prohibit horizontal fracking and reverse the state's current policy requiring environmental regulators to "foster" the oil-gas industry "favorably." Another is an initiative to legalize and tax recreational marijuana.

Both campaigns started collecting last summer, investing time and resources. Towards the end of their 180 days they came to realize they could continue collecting after the 180-day date (up till the cut-off date of June 1), simply by rebutting the presumption that signatures collected before then were invalid. They would do this using the statewide Qualified Voter File, established in Michigan in the late 1990s.

The Senate passed SB 776 with immediate effect, meaning that if enacted into law, the Board of State Canvassers would have to apply it retroactively to ongoing statutory initiative campaigns, such as the above.

But retroactive application would violate a 1923 constitutional ruling of the Michigan Supreme Court in *Hamilton v Deland*:

"A petition must start out for signatures under a definite basis for determining the necessary number of signatures, and succeed or fail within the period such basis governs."

Immediate effect of SB 776 would violate the constitution. Ongoing initiative campaigns must be allowed to continue under the existing law.

The long-range problem

But the bill also has an unconstitutional long-range effect, as applied to statutory initiatives such as the above two.

These initiatives arise under article 2 section 9 of the Michigan constitution (unlike initiatives to amend the constitution itself which arise under article 12 section 2).

Initiative procedures first arose in the state's progressive era in the early 20th century. Statutory initiatives entered the constitution in 1913, five years after constitutional initiatives. The Michigan Supreme Court in 1924 spoke again in *Hamilton v Secretary of State*. The case involved a constitutional initiative but the reasoning applies equally to statutory ones:

"The initiative found its birth in the fact that political parties repeatedly made promises.... As soon as election was over their promises were forgotten, and no effort was made to redeem them.... It was in this mood that the electorate gave birth to the constitutional provision under consideration. ... It was not the

intention of the electorate that the legislature should meddle in any way with the constitutional procedure...."

The Supreme Court again spoke out strongly for initiatives in 1980 in *Ferency v Secretary of State*:

"[A]ssuming that the legislature can impose minimal burdens to keep the process fair, open, and informed, the burden imposed cannot unduly restrict the exercise of the right.

...

... [W]here ... there is doubt as to the meaning of legislation regulating the reserved right of initiative, that doubt is to be resolved in favor of the people's exercise of that right.

...

In effect, we simply repeat today what we have said before:

'(C)onstitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed' and their exercise should be facilitated rather than restricted."

Unlike with constitutional initiatives, article 2 section 9 makes no provision for legislative regulation even though it does provide that the legislature is to "implement" it. In 1971 in *Wolverine Golf Club v Secretary of State* our Supreme Court overruled a 1941 election statute which had imposed a 10-day timing provision:

"We do not regard this statute as an implementation of [article 2 section 9]. We read the stricture [that the legislature may 'implement' article 2 section 9] as a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate. This constitutional procedure is self-executing.

...

'It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision.'"

Based on *Wolverine Golf Club*, in 1974 Attorney General Frank Kelley held the 180-day statute unconstitutional as to statutory initiatives.

Interestingly Kelley also noted the 180-day statute is vague, because it "does not provide what type or quantum of proof is sufficient to overcome the presumption" of staleness and voidness.

For different reasons, the opinion also held the statute unconstitutional as to constitutional initiatives. As to them the opinion was overruled by our Supreme Court in 1986 in *Consumers Power v Attorney General*. The decision did not disturb *Wolverine Golf Club* and had no effect on statutory initiatives. In its current form the 180-day statute remains invalid for statutory initiatives according to Kelley's opinion.

More importantly, under *Wolverine Golf Club*, all limitations of the initiative process -- whether for 180 days or a year or any other period -- are unconstitutional: "It was not the intention of the electorate that the legislature should meddle in any way with the constitutional procedure."

What's to be done?

Of the 24 initiative states, 17 provide a period of a year or more, according to the National Conference of State Legislatures. <http://www.ncsl.org/research/elections-and-campaigns/petition-circulation-periods.aspx>

But unless article 2 section 9 of the constitution were itself amended, the legislature cannot impose any time period.

Is there a time limit in article 2 section 9 itself? Yes. The period is the length of governor's term, which updates the number of required signatures each time the governor is elected. Collectors for Michigan's well-liked "bottle bill" used this period.

The above research was provided to the State Board of Canvassers and the oil-gas industry in the form of position letters in January. The Canvassers placed them on its website. See http://www.michigan.gov/sos/0,4670,7-127-1633_41221---,00.html , "Comments - Part 3" and "Comments - Part 4".

The oil-gas industry has not sought to rebut it.

The bottom line: SB 776 is unconstitutional in both the short-range and long-range views. In court it will be a sitting duck. The House should reject it and save the state from unnecessary litigation.

Citations and sources for the above will be provided on request.

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